LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAY 14 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970.

No. ~~1707~~ 70-169

UNITED TRANSPORTATION UNION,
an Unincorporated Labor Union, and
C. M. CAGLE,
Petitioners,

v.

ATLANTA AND WEST POINT RAIL ROAD COMPANY and
WESTERN RAILWAY OF ALABAMA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

HAAS, HOLLAND, FREEMAN, LEVISON & GIBERT
HUGH W. GIBERT
RICHARD N. HUBERT
R. C. FREEMAN, III
2709 First National Bank Tower
Atlanta, Georgia 30303
(404) 525-6141
Attorneys for the Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutory provisions involved	3
Statement of the case	3
Why the Writ of Certiorari should be granted	10
(a) The Carrier did not make every reasonable effort to settle the dispute	11
(b) The carrier made a unilateral change in working conditions	26
(c) The real purpose of the Carrier is to destroy the U.T.U., a purpose forbidden by the Act	31
Conclusion	33
Certificate of Service	34
Appendix A	A-1
Appendix B	A-17
Appendix C	A-33

TABLE OF CITATIONS

Cases

American Airlines, Inc. v. Airline Pilots Ass'n., 169 F. Supp. 777 (S.D.N.Y., 1958)	16, 17
Brotherhood of Locomotive Engineers v. National Mediation Board, et al., 284 F. Supp. 344 (D.D.C., 1968)	5

Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board, et al., 410 F. 2d 1025 (C.A.D.C., 1969) cert. den., 396 U.S. 878, 24 L.Ed. 2d 136 (1969) 5, 9, 10

Brotherhood of R.R. Trainmen v. Akron & B. R. Co., 385 F. 2d 58 (C.A.D.C., 1967), cert. den. 390 U.S. 923, 19 L. Ed. 2d 983, 88 S.Ct. 849 (1968) 5, 25

Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad Company, 383 F. 2d 225 (C.A.D.C., 1967), cert. den. 389 U.S. 1047 22

Brotherhood of Railroad Trainmen v. Chicago and I. R. Co., 353 U.S. 30, 1 L.Ed. 2d 622, 77 S.Ct. 635 (1957) 11

Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27 v. Toledo, P. & W. R. Co., 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed. 524 18

Brotherhood of Railroad Trainmen v. Toledo, Peoria & W.R. Co., 321 U.S. 50, 88 L.Ed. 534, 64 S.Ct. 413 (1944) 11, 12, 15

The Detroit and Toledo Shore Line R. Co. v. United Transportation Union, 396 U.S. 142, 24 L.Ed. 2d 325, 90 S.Ct. 294 (1960) 11, 27, 31

Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 89 L.Ed. 1886, 65 S.Ct. 1282 (1945) 27

National Airlines, Inc. v. International Ass'n. of M. & A.W., 416 F. 2d 998 (C.A. 5th, 1969) 16, 18

Order of R.R. Telegraphers v. Chicago & N. W. R.R. Co., 362 U.S. 330, 4 L.Ed. 2d 774, 80 S.Ct. 761 (1960) 27

Rutland Ry. v. Brotherhood of Locomotive Engineers, 307 F.2d 978 (1963) 16

United Indus. Wkrs. of Seafarers, etc. v. Board of Trustees, 351 F.2d 183 (C.A. 5th, 1965) 27

Statutes Cited

28 U.S.C. § 1254 2

Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101, et seq. 3, 10, 11, 12, 13, 14, 15, 16, 17, 18, 26

Railway Labor Act, 45 U.S.C. § 151, et seq. ..2, 3, 4, 5, 8 13, 14, 17, 18, 19, 20, 26, 28, 30, 31, 32

Public Law 88-108, 77 Stat. 132 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970.

No. .....

UNITED TRANSPORTATION UNION,
an Unincorporated Labor Union, and
C. M. CAGLE,
Petitioners,

v.

ATLANTA AND WEST POINT RAIL ROAD COMPANY and
WESTERN RAILWAY OF ALABAMA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Petitioners, the United Transportation Union and C. M. Cagle, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered *sub nomine* **Atlanta and West Point Rail Road Company and Western Railway of Alabama v. United Transportation Union, an unincorporated Labor Union, and C. M. Cagle,** on the 19th day of February, 1971.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, is set out in Appendix A hereto. The Order of the United States District Court for the Northern District of Georgia, reported at 307 F. Supp. 1205, is set out in Appendix B, hereto.

JURISDICTION

The decision of the Court of Appeals was entered on February 19, 1971.

The jurisdiction of the Court is invoked pursuant to Title 28 U.S.C. § 1254.

QUESTIONS PRESENTED

I

Whether the Court below erred in holding that a union should be enjoined from striking because of a failure to have meaningful Railway Labor Act negotiations where the failure to have such negotiations is attributable solely to the Carrier's actions to frustrate negotiations.

II

Whether the Court below erred in holding that the agreement between the Carrier and another union (Brotherhood of Locomotive Engineers), and its implementation, did not constitute a change in the terms and conditions of employment of the appellants' firemen, where the agreement, and its implementation, had an adverse effect upon the firemen's seniority and "historical expectation of promotion to the job of engineer."

III

Whether the Court below erred in holding that the Union should be enjoined from striking because of the failure to have Railway Labor Act negotiations where the Carrier instituted unilateral changes in working conditions (directly related to the subject matter of the Union's Section 6 Notice), while refusing to negotiate with the Union.

IV

Whether in issuing the preliminary injunction against the strike the District Court failed to give proper force and effect to Section 8 of the Norris-LaGuardia Act, and whether in affirming the Order of the District Court the Court of Appeals similarly erred?

V

Whether the District Court injunction and the Court of Appeals' affirmance constituted error where the Carrier's simultaneous (a) negotiation of an agreement with the Brotherhood of Locomotive Engineers, and (b) refusal to negotiate with Appellant, on a matter in which both unions had an interest, were for the purpose, and had the effect, of influencing the employees in their choice of representative in violation of Section 2 of the Railway Labor Act?

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Railway Labor Act and of the Norris-La Guardia Act are set out in Appendix C, hereto.

STATEMENT OF THE CASE

Petitioners seek review of a decision of the Court of Appeals for the Fifth Circuit which affirmed the issuance of a preliminary injunction prohibiting a strike in a railway labor "major" dispute.

Appellants are the United Transportation Union (UTU) and C. M. Cagle, a member of the Union who was sued as a representative of the membership. Appellees are the Atlanta and West Point Railroad Company and the Western Railway of Alabama. Hereafter we shall refer to the Appellees collectively as the "A & WP" or the "Carrier" since no distinctions need be made between the two companies.

The Union struck on November 15, 1969. On the same day the District Court issued an ex parte restraining order and the strike ended. A hearing was held on December 4th and 5th and on January 5, 1970 the Court entered the preliminary injunction. The Court of Appeals affirmed.

On November 15, 1965, that is, four years before the strike, the Brotherhood of Locomotive Firemen and Enginemen (B.L.F.&E.) served a Section 6 Notice upon the A & WP proposing a training program to qualify firemen for promotion to engineer. App. 139; for full text see App. 88-107. (The UTU is the successor of the B.L.F.&E.) The Railway Labor Act (45 USC, §151, et seq.) contemplates that when such notice is served then the party receiving the notice shall either accept the proposal or notify the proposing party that conferences on the proposal will begin at a specified time and place. The Act requires that these conferences begin within 30 days. See 45 USC, §156.

In the case at bar the Carrier responded to the Union's proposal by scheduling a conference. The conference was not scheduled, however, for the purpose of bargaining about the Union's proposal, but rather for the purpose of stating to the Union representative that the Carrier would not discuss the merits of the proposal. App. 139, 287-288, 349. Up to the time of the strike no negotiations on the merits of the Union's proposal had ever taken place.

No negotiations took place because the A & WP refused to negotiate, and thus violated the duty imposed upon both parties by the Railway Labor Act. We will return at a later point to the conclusion drawn by the District Court that "at one time or another" both parties refused to negotiate. The actions and positions of the Union were at all times forced responses to the several positions of the Carrier.

The A & WP, as grounds for refusing to negotiate, took, during the period November 15, 1965 to November 15, 1969, three legal positions. They were the following: (1) The Union's Section 6 Notice was "non-bargainable" because it was "premature." (2) The Union's Section 6 Notice had to be discussed concurrently with certain proposals by the Carrier, if and when it was discussed at all. (3) The Union's Section 6 Notice could not be discussed because the right of the firemen's union to bargain about a training program for promotion of its members to engineer was involved in litigation.

In order that these positions can be made understandable it is going to be necessary to broaden the discussion so as to place this dispute in its historical context and in context with the national dispute to which it is related. This we will now proceed to do. It is appropriate, however, to note here that each of the three positions taken by the Carrier has proved to be invalid.

The facts upon which most of the following discussion is based have been found in a number of reported decisions, among them **Brotherhood of Locomotive Engineers v. National Mediation Board, et al.**, 284 F. Supp. 344 (D.D.C., 1968), reversed in **Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board, et al.**, 410 F. 2d 1025 (C.A.D.C., 1959), cert. den. 396 U.S. 878, 24 L.Ed. 2d 136 (1969), and **Brotherhood of Railroad Trainmen v. Akron and B.B.R. Company**, 385 F. 2d 581

(C.A.D.C., 1968). These cases were called to the attention of the District Court and he relied upon the facts found in them. See, for example, footnote 1 of his Opinion, App. 135. See, also, the opinion of the Court of Appeals, p. 3.

The immediate history of the dispute goes back to the 1950's when the nation's railroads* sought to eliminate the job of firemen on diesel locomotives.

The position of the railroads was that firemen's jobs were superfluous, a contention opposed by the firemen's union, the B.L.F. & E.

The dispute resulted in a special Act of Congress, Public Law 88-108, 77 Stat. 132, which created Arbitration Board 282, with authority to resolve the dispute and bind the disputants to the resolution. Board 282 did resolve the dispute, the resolution being known as Award 282.

---

* Reference is made to the "railroads" or the position of the "Railroads" or to the "Carriers" in recognition of the following facts. The A & WP is a member of the National Railway Labor Conference, an organization whose members comprise about 90% of the railroad companies in the United States. In the dispute discussed in this Brief the various members of the National Railway Labor Conference coordinated their actions, communicated with the Unions by means of form letters, and so on, with the National Railway Labor Conference calling the shots. The various positions taken by the A & WP with respect to the Union's Section 6 Notice were the positions suggested by the Railway Labor Conference and in almost all respects the same as the positions taken by various other railroads around the country. In fact, shortly after the Union had transmitted the Section 6 Notices, the A & WP, as did many railroads, conveyed its power of attorney to the National Railway Labor Conference to deal with the subject matter of the November, 1965 Notices. See App. 243.

In one respect, however, the A & WP acted differently from most of the other railroads. The A & WP signed an agreement with the Brotherhood of Locomotive Engineers (hereinafter B.L.E.) in the summer of 1969. Most of the other railroads did not take this action.

Award 282 allowed the railroads to eliminate the jobs of a great many (up to 90%) of the firemen in the country. As a result, some 18,000 firemen lost their jobs.

The award established work rules or procedures (pursuant to which the 18,000 jobs were eliminated) which were to have a two-year duration. It was contemplated by Congress that the parties would negotiate for new rules or procedures to replace or supplement Award 282 after it had expired. The two-year life of Award 282 was from January, 1964 to January, 1966 (except in the case of the B.L.F. & E. with respect to whom the Award expired March 30, 1966). The dates are of some significance and we shall return to them shortly.

Historically, two men had worked in locomotive cabs, namely the engineer and the fireman (also known as the "helper"). Traditionally, firemen had been promoted, after acquiring appropriate training and seniority, to become engineers. Almost all of the need for qualified engineers on the nation's railroads had been met by promotions from the ranks of firemen.

One of the consequences of the elimination of firemen's jobs pursuant to Award 282 was potentially to dry up the source of engineers. It became necessary to give systematic consideration to the question of procurement of engineers.

Two Unions claimed an interest in the establishment of training programs for prospective engineers. These were the B.L.F. & E. (now the UTU) and the B.L.E. The claim of the BLF & E was predicated on the proposition that it had a right to negotiate about training for posts into which its members had traditionally graduated. Also, seniority acquired as a fireman had always qualified a man for a promotion to engineer and had given him a claim to the job. Contracts between the BLF & E and the BLE and the Railroads had for many years limited the

right of the railroads with regard to the hiring of engineers other than from the firemen's ranks. (The history of that situation goes at least as far back as 1913 when the BLF & E and the BLE signed what is known in the railroad industry as the Chicago Joint Agreement. Although this agreement was abrogated by the BLE in 1927, the seniority and promotion rules contained therein continued to be negotiated into contracts with the carriers.)

The BLE on the other hand, claimed an interest in any training program for apprentices who would ultimately join the ranks of the engineers and the BLE.

On November 15, 1965, the BLF & E served notices upon a large number of railroads to the effect that the BLF & E desired to negotiate about certain proposed changes in the conditions of employment of its members (Section 6 Notices, pursuant to Section 6 of the Railway Labor Act, codified at 45 USCA, § 151, 156). These notices, known respectively as Notice No. 1, Notice No. 2 and Notice No. 3, were served on the A & WP. Notice No. 3 called for negotiations for the establishment of a training program for firemen to equip them for future promotion and was involved in the strike which was restrained, ex parte, by the District Court on November 15, 1969, and preliminarily enjoined on January 5, 1970. App. 133-147. Therefore, the treatment by the parties of Notice No. 3 is one of the matters which is at the heart of the dispute and at the heart of this litigation. In our view, it is only the treatment of Notice No. 3 which is of crucial importance to this case, but the second position (supra) by the railroads (the demand for concurrent handling) makes it necessary to continue, for a time, discussion of Notices Numbered 1 and 2.

Each of the three November 15, 1965 Notices proposed changes in the work rules to become effective March 31, 1966, that is, the day after the expiration of Award 282.

Therefore, they contemplated negotiation during the two year period when work rules were established by Award 282. The railroads took the position that the Notices were, for that reason, non-bargainable. That is, they took the position that Award 282 relieved them of any obligation to bargain during its life, even with respect to changes in working conditions proposed to be effective **after** the expiration of Award 282. This was the A & WP's first contention referred to above, that the notices were "premature." App. 288-290.

Shortly after Notice No. 9 was served by the BLF & E, the BLE had notified the Railroads that they should not bargain with the BLF & E with respect to Notice No. 3. When the National Mediation Board scheduled mediation conferences with the BLF & E and L & N and BLF & E and the Southern Pacific to discuss Notice No. 3, the BLE filed suit to enjoin the conferences. This was the lawsuit reported as **Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board**, et al., 410 F. 2d 1025, supra, certiorari denied, 396 U.S. 878, October 20, 1969.

The A & WP was not subject to any injunction not to bargain with the BLF & E because of that lawsuit. Nevertheless, the A & WP refused to negotiate while the suit was pending. This was the A & WP's third position referred to above. The District Court's statement in his opinion that "While this litigation was pending it appears that all parties held off awaiting the outcome" is flatly contradicted by the evidence. (The Court of Appeals regarded this conclusion as "plausible." See its Opinion, p. 5.) The uncontradicted testimony of Mr. Carr of the Union was that he made numerous requests of the Personnel Manager of the Carrier to negotiate about Notice No. 3 and the reply he always received was that the Carrier would not negotiate because of the BLE-L & N litigation. App. 350-352.

The BLE-L & N litigation resulted in an opinion in March, 1969 holding that Notice No. 3 was bargainable and that the Carrier was obligated to bargain with the firemen's union about it. That is, the position of the Carriers and the BLE was rejected. **Brotherhood of Locomotive Firemen & Enginemen v. National Mediation Board**, 410 F. 2d 1025, supra. Nevertheless, no bargaining between the A & WP and the UTU took place. The carriers and the BLE filed, in June, 1969, petitions for certiorari to this Court, which petitions were denied in October, 1969.

While the petitions for certiorari were pending, the Railway Labor Conference's position was that it would still be "inappropriate" to bargain about proposals for a training program. See Circular No. 535 of June 10, 1969. App. 83. The A & WP adopted that position in a letter to the General Chairman of the BLE dated June 16, 1969, App. 84, but evidently abandoned it vis-a-vis the BLE because, while the petitions were pending, an agreement was signed between the BLE and the A & WP. App. 134, 302, 308.

In November, 1969 the A & WP began to implement its training program agreement with the BLE. The UTU which had tried for four years to bargain over its own training program proposal, and which had had all its efforts frustrated for four years, went out on strike. The District Court, in spite of the Norris-LaGuardia Act, enjoined the strike after less than one day, and a little over a year later the Court of Appeals affirmed.

WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

As will be more fully shown, hereinafter, the Order of the District Court and the decision of the Court of Appeals ignored, or failed to apply properly, Section 8 of the Norris-LaGuardia Act, 47 Stat. 70, 20 U.S.C., § 101,

108, and the status quo provisions of the Railway Labor Act, 45 U.S.C., § 151, et seq., and were in conflict with applicable decisions of this Court, and of other Courts of Appeals. In particular, the decision below conflicted with the decision of this Court in **Brotherhood of Railroad Trainmen v. Toledo, Peoria & W.R. Co.**, 321 U.S. 50, 88 L. Ed. 534, 64 S.Ct. 413 (1944), and **The Detroit and Toledo Shore Line R. Co. v. United Transportation Union**, 396 U.S. 142, 24 L.Ed. 2d 325, 90 S.Ct. 294 (1960). In addition, the decision below conflicted with decision of Courts of Appeals of other Circuits, which will be discussed, infra.

(a) The Carrier Did Not Make Every Reasonable Effort to Settle the Dispute

As of the date of the *ex parte* restraining order, the union had been trying for exactly four years to engage the Carrier in negotiations with respect to Notice No. 3 and for exactly four years the Carrier had prevented negotiations from taking place.

This Court has often recognized that it is the duty of a federal court, called upon to enjoin a strike in a labor dispute in the railroad industry, to **reconcile** the policies underlying the Railway Labor Act, 45 USC, § 151, et seq., on the one hand, and the Norris-La Guardia Act, 47 Stat. 70, 29 USC, § 101, et seq., on the other. See, for example, **Brotherhood of Railroad Trainmen v. Chicago and I.R. Co.**, 353 U.S. 30, 1 L.ed. 2d 622, 77 S.Ct. 635 (1957). Neither of the Courts below has reconciled the policies of the two Acts but, instead, both have relegated Norris-La Guardia to a completely subordinate status. If the decision stands unreversed, section 8 of Norris-La Guardia will have been, in effect, repealed.

Although Section 4 of the Norris-La Guardia Act is absolute in its terms,

> "No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute . . ."

it has not operated to abolish completely the labor injunction. Evidently that is what the District Court had in mind when he said, "Nothing in the Norris-La Guardia Act bars such relief."

However, no case (with the exception of this one, so far) had held that the Norris-La Guardia Act has **no** place in a railway labor dispute. The duty of the Court is to **reconcile** the policies of the two Acts and it may not simply ignore Norris-La Guardia in the name of preventing an interruption of railroad service, no matter how important that goal may be.

Section 8 of the Norris-La Guardia Act provides as follows:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, **or who has failed to make every reasonable effort to settle such dispute** either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." (Emphasis supplied.)

Brotherhood of R.T. v. Toledo, Peoria & W.R. Co., 321 U.S. 50, 88 L.Ed. 534, 64 S.Ct. 413 (1944), is the case which has given the definitive interpretation of that provision. In that case there was a strike accompanied by violence. (The events all took place between the bombing of Pearl Harbor and the end of World War II, a time when interruption of transportation service was at least as important as it is now.) The employer had declined to participate in **voluntary** arbitration. **It had no duty to**

do so under the Railway Labor Act. Nevertheless, failure to do so was a failure to "make every reasonable effort to settle such dispute" as is required by Section 8 of Norris-La Guardia. Therefore, the issuance of an injunction was improper and was reversed.

The effect of Section 8 and its relationship to the Railway Labor Act was made crystal clear in the following language of the Court:

> "Broadly, the section imposes two conditions. If a complainant has failed (1) to comply with any obligations imposed by law or (2) to make every reasonable effort to settle the dispute, he is forbidden relief. The latter condition is broader than the former. One must not only discharge his legal obligations. He must also go beyond them and make all reasonable effort, at least by the methods specified if they are available, though none may involve complying with any legal duty." 321 U.S. at 57.

And further on:

> "Respondent's final contention, in this phase of the case, is the most insistent. It is that if 'voluntary arbitration', as the term is used in § 8, encompasses arbitration under the Railway Labor Act, by that fact the arbitration ceases to be 'voluntary' and the latter Act's requirement that it be so is violated. In short, it is said the effect is to force respondent to submit to compulsory arbitration.
>
> . . .
>
> "And if the effect of bringing that form of arbitration within the mandate of § 8 of the Norris-La Guardia Act were to create such a duty, so enforceable, respondent's contention would be more in point. But it does not do that. . . . Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act

> or by the Norris-La Guardia Act. No one has recourse against it by any legal means on account of this failure. Respondent is free to arbitrate or not, as it chooses. **But if it refuses, it loses the legal right to have an injunction issued by a Federal court or, to put the matter more accurately, it fails to perfect the right to such relief.**'' 321 U.S. at 62, 63. (Emphasis supplied.)

It seems to us that this makes the point very clearly. Section 8 of the Norris-La Guardia Act is an inhibition on the equitable power of the federal court. As such, it stands on a different footing from the Railway Labor Act. Not one word was said by the Court about whether the Union had violated obligations under the Railway Labor Act. In fact, the persistence of incidents of violence which the local authorities could not or would not control certainly made the case an appropriate one for federal intervention. But the Norris-La Guardia Act precluded the injunction because the employer, **though it had done everything required of it by the Railway Labor Act,** had not ''perfected'' its right to equitable relief by making ''every reasonable effort to settle'' the dispute.

In the case at bar there is no pretense that the A & WP had made every reasonable effort to settle the dispute with the UTU. The hearing on December 5th* began with a controversy over who had the duty to go forward with evidence. See App. 222-225. It is clear that the District Court was of the opinion that the Union was required to justify its strike, not that the Carrier had to justify its claim to equitable relief, let alone the obligation to show that it had ''perfected'' such claim by making every reasonable effort to settle the dispute. The controversy over the order of proof ended when counsel for the Carrier stated:

---

* The hearing on December 4th was very brief and did not include presentation of evidence.

"Mr. Major: I'm perfectly willing to go ahead and prove those **base-touching** allegations, Your Honor." App. 225 (Emphasis supplied.)

The District Court did not find that the Carrier had perfected its right to equitable relief. To the contrary, it held that the Carrier was entitled to injunctive relief even if the fact that negotiations had not taken place as is contemplated by the Railway Labor Act was the sole fault and responsibility of the Carrier! These words are the crux of the decision on this point:

> "Holding as we do that the carriers' mere refusal to bargain, standing alone, would not provide a lawful basis for a strike, it follows that we need not decide which party is the culprit, or indeed whether both parties have failed to fufill their statutory obligation to confer." District Court Opinion, p. 13; App. 146.

How that holding can be squared with **Toledo, Peoria,** supra, is beyond us. It shows a complete disregard of Norris-La Guardia, where the question is **not** whether the Union can show a lawful basis for a strike, but whether the employer can show that it has perfected a claim to equitable relief.

In affirming, the Court of Appeals also stood the Norris-La Guardia Act on its head. On page 13 of its Opinion the Court below said (apropos of **Toledo, Peoria**):

> "Crucial to the Court's rationale is the fact that at the time the railroad sought to enjoin the strike, it was also refusing to arbitrate. Thus the union had exhausted every available avenue to agreement **and was free to resort to self-help, whatever the consequences.**" (Emphasis supplied.)

But the **Toledo, Peoria** case is clearly bottomed upon Section 8 of Norris-La Guardia which was designed to protect the right to strike and is solely for the purpose

of limiting the authority of courts to issue injunctions against strikers at the behest of employers. The "clean hands" provision (§ 8) is aimed at employers, not unions. The employer must have clean hands. So far as Norris-La Guardia is concerned the Union does not have to do anything in order to become "free to resort to self-help." The claim is always that the union is not free to resort to self-help because of illegality of the strike and Norris-La Guardia says, in effect, "Even if the union's strike is illegal, you, Mr. Employer, may not get an injunction from a federal court to end the strike unless you, Mr. Employer, come into court with clean hands."

To end the analysis at the point of deciding that the union is not "free to resort to self-help," as both of the courts below did, is to end it precisely at the point where section 8 of Norris-La Guardia and this Court in **Toledo, Peoria** say that analysis must begin.

To read **Toledo, Peoria** as turning upon what the union had done to make itself free to strike is to misread it completely.

None of the cases cited by the Court below actually support the conclusion that it was proper to enjoin the strike. Three cases were cited by the District Court, followed by the statement that it followed that negotiations had to begin and the strike had to be enjoined. The cases relied on were **National Airlines, Inc. v. International Ass'n. of M.&A.W.**, 416 F. 2d 998 (C.A. 5th, 1969), **American Airlines, Inc. v. Airline Pilots Ass'n.**, 169 F. Supp. 777 (S.D. N.Y., 1958), and a dissenting opinion in **Rutland Ry. v. Brotherhood of Locomotive Engineers**, 307 F. 2d 978 (1963). Each of these cases was contrary to the position taken by the Court below. Each of these cases was consistent with the position urged here, namely that Norris-La Guardia forbids an injunction in a railway labor case, unless **both** (1) the strike is in violation of the Union's

duties under the Act **and** (2) The carrier has satisfied the mandate of Section 8 of Norris-La Guardia. The second requirement encompasses **both** (1) complying with all the requirements of the Railway Labor Act **and** (2) going the extra mile involved in making every reasonable effort to settle the dispute.

That is quite clearly the holding of the **Rutland Railway** case. At 307 F. 2d 37 the Court said the Norris-La Guardia deprives federal district courts of jurisdiction to enjoin strikes except in limited circumstances,

> "and precludes injunctive relief even when these stringent requirements are met if the complainant has failed to fulfill, on its part, its legal obligations or has failed, on its part, to make reasonable efforts to settle the labor dispute by negotiation, mediation or voluntary arbitration."

The explicit holding of the **Rutland Railways** case appears at 307 F. 2d 41:

> "In the present case the district court made no finding whether the management of the railroad made the good faith efforts which we have held to be a prerequisite to the obtaining by it of injunctive relief . . .
>
> . . .
>
> Therefore, we must remand the case for the district court to determine whether the railroad made reasonable efforts to settle this dispute in conference."

We fail to see why the court below was justified in relying upon a statement drawn from a dissenting opinion in view of that clear holding.

The **American Airlines** case provides no more support for the conclusion of the court below. In that case the court held, at 169 F. Supp 798, that the employer had

failed to show that the union had violated the Railway Labor Act, and therefore **denied** the preliminary injunction. It then went on to say:

> "Since this is so it is unnecessary to pass on the Union's contention that the Company is barred from injunctive relief under Section 8 of the Norris-La Guardia Act because of its refusal to submit any except limited issues to arbitration under Section 5 of the Railway Labor Act. Cf. **Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27 v. Toledo, P. & W.R. Co.**, 321 U.S. 50, 64 S. Ct. 413, 88 L.ed. 524."

The **National Airlines** case involved a "wildcat" strike, which was actually opposed by the union. At 416 F.2d 998 the Court pointed out:

> "The Union here has consistently maintained that the strike was unlawful, and, with the exception of its objection to the language pertaining to discharge contained in the second order issued by the court, concedes the propriety of injunctive relief to end the strike."[4]

At this point, in footnote 4 the Court indicates that the concession was misplaced and gratuitously points out that in spite of the illegality of the strike it might have been immune from an injunction by virtue of Section 8 of Norris-La Guardia. Thus, **National Airlines** is not contrary to the position taken here and does not support the conclusion of the Court below that a carrier that prevents a union from engaging in negotiations prescribed by the Act can use the result it has unlawfully achieved as a **basis** for obtaining equitable relief.

That was a truly remarkable conclusion, and it finds no support in the cases.

Thus, the granting of the injunction would be wrong even if, as the District Court seemed to suggest, in the above excerpt and elsewhere in his opinion, the Union was a "culprit" also and might have refused to bargain over its own Section 6 Notice. That factual suggestion, in any event, is not supported by the record. The whole record shows clearly that the Carrier frustrated the efforts to bargain by taking three untenable positions.

First, it was said that no bargaining could take place with respect to Notice No. 3 because it was "premature". App. 288-290. See DX 7 and 8, App. 108-112, and the uncontradicted testimony of Mr. Carr, beginning at App. 351. Even in the summer of 1969 the Railway Labor Conference was giving advice that it was "inappropriate" to bargain because of the pendency of the petitions for certiorari, App. 83, and the A & WP was parrotting that line. App. 84-85. The short answer to the contention is that it was rejected by the Court of Appeals for the District of Columbia in the L & N case. See 410 F. 2d 1025, 1032.

The effect of that holding is that the Carrier has been in violation of the Railway Labor Act since late 1965. The District Court's suggestion that perhaps the Union, which fought that case to a successful conclusion for the purpose of vindicating the right to bargain over Notice No. 3, was the culprit that refused to bargain is absurd on its face.

The Carrier took the position that no bargaining could take place with respect to any of the November 15, 1965 notices prior to March 30, 1968. See the testimony of Mr. King, Personnel Manager for the Carrier, at App. 290:

> "Mr. Gibert: With regard to Notice Number 1, 2, and 3, you took the position that none of those was

bargainable during the period prior to March 30, 1966, is that correct?

The Witness: That's correct."

The District Court relied, for its suggestion that the Union has refused to bargain, entirely upon a letter of February 22, 1966, from Mr. Carr of the Union saying that talks had ended. See p. 7 of the District Court Opinion, App. 141. But this misconceives the situation. The Railway Labor Act prescribes certain procedures. The Union desired to exhaust those procedures because the Carrier had made it clear that it would not negotiate. Mr. Carr's letter, therefore, written at a time when the Carrier would not negotiate because of its "prematurity" claim, was an effort to move the matter off dead center. It failed because of the resourcefulness of the Carrier, as we have seen.

Mr. Carr's letter also was a rejection of "concurrent handling." This relates to the Carrier's second position, discussed infra. Mr. Carr's rejection of concurrent handling was proper.

Moreover, Mr. Carr testified without contradiction that he tried numerous times after February 22, 1966 to negotiate with the Carrier about Notice No. 3. The answer was always that no negotiations could take place because of the pendency of the litigation. App. 351-352.

The District Court seemed to rely upon the informality of Mr. Carr's requests to negotiate and to suggest that the Union was required to make further "formal" offers to negotiate. See p. 8 of the District Court Opinion, particularly footnote 10:

> "It is true, however, that at the hearing the head of the union did testify that thereafter at one or more chance meetings he did orally mention further negotiations which were refused." App. 141.

Indeed he did so testify, and without contradiction. And what was the point of making a "formal" offer? There was already an elaborate proposal (Notice No. 3) on the table and the Carrier's position that, for several different reasons, it would not negotiate about it had been made very clear.

Besides, the Carrier is not always so scornful of informal requests to negotiate. See the following colloquy between counsel for the Union and Mr. King of the A & WP:

"By Mr. Gibert:

Q. They start with Section 6 notice, right? That is, these major dispute questions.

A. Not necessarily. We have negotiated agreements without necessity of a Section 6 Notice.

Q. Oh. Then, how? Telephone conversations?

A. Telephone conversations or personal telephone calls or chance encounter in many cases." App. 296.

The Court of Appeals added a ground for finding that the Carrier was ready to negotiate but the union was not. On page 15 of the Opinion, it is stated that the Carrier, even if it frustrated negotiations for four years, was ready to negotiate on the day of the strike. With respect, we say that the Court of Appeals is mistaken.

The District Court did not find that the Carrier was ready to bargain on November 15, 1969. The facts upon which the assertion of the Court of Appeals is predicated were that the National Railway Labor Conference, on November 7, 1969, sent a letter to the Union President proposing negotiations in Washington, D. C. (Appendix, p. 49).

In this letter the Railway Labor Conference was not actually attempting to commence negotiations. It was, for one thing, falling back to its second position, "concurrent handling." We will discuss the merits of the second position more fully, infra, but it is important to remember

that the demand for concurrent handling was a device briefly used in early 1966 to avoid negotiations, a device that was put on the shelf after the commencement of the litigation in Washington. The pendency of the litigation did service as a way of avoiding negotiations until October 20, 1969, so on November 7 position number 2 was dusted off and pressed back into service.

In addition, the letter of November 7 inserted a new issue, namely, national versus local handling. In effect, the proposal to negotiate in Washington, with the Railway Labor Conference and the president of the union as negotiators, was a demand for national handling and was in no sense an expression of willingness by the Carrier involved in the case at bar to negotiate with the union. Parenthetically, national handling is desired by the carriers so that negotiations will take place in a crisis atmosphere, that is, so that any strike will create a national emergency.

The issue of national versus local handling was not actually presented to either of the Courts below. It was not briefed or argued. By saying that the carrier was ready to negotiate because of the letter of November 7, 1969, the Court of Appeals has, perhaps unwittingly, decided the complex issue of national versus local handling without the benefit of argument, briefs or evidence.

In **Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad Company**, 383 F. 2d 225 (C.A.D.C., 1967), cert. den. 389 U.S. 1047, the issue of national versus local handling was discussed. The District Court had enjoined a strike on the ground that the union had improperly refused the carrier's request for national handling. The Court of Appeals reversed and this Court denied certiorari. The Court of Appeals held that national handling was lawful if both parties agreed, but not necessarily required if one party objected and said:

> "We would require a strong showing of continuous collective bargaining practice on a national scale before we find an obligation imposed by Congress to bargain on a basis deemed 'wholly unrealistic' by objective boards officially deputized to study the underlying problems and formulate appropriate dispositions." 383 F.2d at 229.

In fact the case at bar was not appropriate for national handling since the A & WP was not in the same posture as the other carriers. The A & WP had signed an agreement with the BLE and most of the nation's carriers had not.

However, regardless of the merits of this dispute, the District Court had not decided it and there was certainly not made any

> "strong showing of continuous collective bargaining practice on a national scale."

For that reason also, the Court of Appeals should not have held that the A & WP finally repented and become ready to negotiate on November 7, 1969. The District Court did not find that, and the evidence would not have warranted such a finding.

Even at the preliminary injunction hearing, where at least the pretense of being willing to negotiate was obviously called for, the representative of the carrier was curiously ambivalent about it, to say the least:

> "Q. Are you prepared to negotiate on Monday morning, again, sir? At 4 Hunter Street? A. Depends on the terms.
>
> Q. Well, are you—— A. Are you saying, if you're asking for dissolution or, doing away with this restraining order and say we'll negotiate and spend ten minutes and walk out Monday and put up picket

signs, sir, is that, those are some of the terms we need to know.

Q. Good faith negotiations between the UTU, represented by Mr. Carr, and the A & WP represented by you, about Notice Number 3 on Monday morning at 4 Hunter Street? A. What is your definition, sir, of good faith negotiations?

Q. Can you answer the question? A. It would depend on what you mean by good faith negotiations. If it's a touch-base proposition with another strike before day in the morning, my answer is no.

The National Railway Labor Conference has said for us that we will mediate the dispute under the provisions of the Railway Labor Act, the machinery set up for handling such disputes.

Q. For that matter, you could invoke the National Mediation Board for the A & WP, could you not? A. That has been done for us by the National Railway Labor Conference.

Q. You could have done that at any time? A. That's correct. And so could the former BLF & E. They didn't.

Q. And you didn't? A. That's right. And neither did the organization, sir.

Q. All right. And you can't tell me whether in response to my question, since you don't know what I mean by good faith negotiation, you can't answer the question of whether you're willing for the A & WP and the Union to commence good faith negotiations on Monday morning, on Notice Number 3? A. Mr. Gibert, in twenty-nine years of railroading, I've seen good faith negotiations mean many things to many people. App. pp. 342, 343.

The only other possible basis for the Court's suggestion that the Union refused to negotiate relates to the second position of the Carrier. It will be remembered that the

second position was that the three November 15, 1965 Notices were a "package" proposal and had to be discussed concurrently with the Carrier's so-called counterproposal. See p. 7 of the District Court Opinion, App. 139-140.

Regardless of the merits of that dispute, the Carrier's second position was only relied on until the summer of 1966. At that time it was replaced by the third position, that the litigation precluded negotiations.

The Carrier's second position was specious in any event. Notice No. 1 related to the types of engine service on which the employment of firemen would be required.

Notice No. 2 provided for compensation to firemen who had been relocated, severed or otherwise disadvantaged by the operation of Award 282.

Notice No. 3 called for establishment of a training program for apprentices. See **Brotherhood of R.R. Trainmen v. Akron & B.R. Co.**, 385 F. 2d 581 at 600 (C.A.D.C., 1967), cert. den. 390 U.S. 923, 19 L.Ed. 2d 983, 88 S.Ct. 849 (1968). See also Defendants' Exhibits 7 and 8, App. 108, 112.

Thus the three notices related to different things. The railroad's counterproposal clearly related to Notice No. 1; it said nothing about a training program and therefore was in no sense a counterproposal to Notice No. 3.

The subsequent treatment of the notices also shows the speciousness of the Carrier's second position. In **Brotherhood of Railroad Trainmen v. Akron & B.B.R. Co.**, 385 F.2d 581 (C.A.D.C., 1967), the Court held that Notice No. 1 was bargainable, Notice No. 2 was not, and that it need not rule on Notice No. 3. Notice No. 3 was held bargainable in the case reported at 410 F.2d 1025. Thus the notices were treated separately and as presenting separate issues.

Moreover, Notice No. 1 **and the Carrier's counter-proposal** were jointly mediated, up to the level of the Secre-

tary of Labor. See App. 327. Thus, it is clear that the Carrier's insistence on negotiating Notice No. 3 concurrently with the unrelated counterproposal and the Union's refusal to do so cannot be used as justification for the injunction. The whole history of the dispute, including the Carrier's shelving of its second delaying tactic in favor of its third shows that the call for "concurrent handling" was no more than that, a delaying tactic.

Thus, and to conclude this portion of the argument the District Court's opinion that the Union may have frustrated the negotiations or may have been equally at fault with the Carrier is seen to be totally without support in the record. But, even if it were factually supportable, it would still be improper to issue the injunction because of the Carrier's failure to meet its obligations under Section 8 of the Norris-La Guardia Act.

(b) The Carrier Made a Unilateral Change in Working Conditions

It is the position of the UTU that the agreement between the A & WP and the BLE and its implementation make a change in the working conditions of the firemen. Since no Section 6 Notice was served by the Carrier upon the firemen's union, the UTU, this constitutes a separate and independent justification for the strike and a separate reason that the injunction was unlawful.

Section 2, Seventh of the Railway Labor Act provides:

> "No Carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 6 provides, in pertinent part:

> "Carriers and representatives of employees shall give at least thirty days' written notice of an in-

> tended change in agreements affecting rates of pay, rules, or working conditions . . . In every case where such notice of intended change has been given . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . ." 45 USC, §152.

There is no claim in the case at bar that the A & WP complied with those provisions, vis a vis the UTU, prior to making and implementing the training agreement with the BLE. Much of the Opinion of the court below was devoted to defending the position that it did not have to do so because that agreement and its implementation did not change the working conditions of the firemen.

This conclusion was plainly erroneous.

Two cases make it clear that, in spite of the expression, "embodied in agreements," used in Section 2, Seventh, the concept "working conditions" is given a very broad meaning to include any custom, established practice, expectation based on custom, or the like. These cases include **United Indus. Wkrs. of Seafarers, etc. v. Board of Trustees**, 351 F. 2d 183 (C.A. 5th, 1965), where the leasing of certain facilities by the employer resulted in the "permanent layoff" of some employees. The Carrier contended that since it did not make or propose to make a change in the **agreement** the dispute was a "minor" dispute.* The Court rejected this argument, relying upon **Order of R. R. Telegraphers v. Chicago & N.W.R.R. Co.**, 362 U.S. 330, 4 L.Ed. 2d 774, 80 S.Ct. 761 (1960), which had held that a stipulation about contracting out of work ordinarily performed by members of the union was a "condition of employment."

Even more conclusive is **The Detroit and Toledo Shore Line R. Co. v. United Transportation Union**, 396 U.S. 142,

---

* Cf. **Elgin, Joliet & E. Ry. v. Burley**, 325 U.S. 711, 89 L.Ed. 1886, 65 S.Ct. 1282 (1945).

24 L.Ed. 2d 325, 90 S.Ct. 294 (1960). There the contract was completely silent on the question of "outlying work assignments" (the right of the railroad to make work assignments away from its main yard). This Court phrased the question and its answer as follows:

> "Respondent, a railroad brotherhood, contends that what must be preserved as the status quo are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing collective agreement. For the reasons stated below, we think that only the union's position is consistent with the language and purposes of the Railway Labor Act." 24 L.Ed. 2d at 329.

It is clear that the historical expectations of the firemen that they will be promoted to engineer, and the seniority rules related to these expectations are a term or condition of the employment of the firemen. As such, these expectations are part of the status quo that the Carrier had no right to change without complying with Section 6 of the Act.

The **very question** now being discussed was decided by the Court of Appeals for the District of Columbia in the case reported at 410 F.2d 1025. Evidently the Court below overlooked the following language from that case:

> "Here, even assuming that the Firemen will never represent any of the apprentice engineers, present firemen have a 'job security' interest in the length and size of the apprentice program. Their union has long bargained with the carrier over the process of turning firemen into engineers.[20] In the past they have even bargained to restrict carriers' practice of bringing in outside engineers to fill vacant jobs.[21] Thus their historical expectation of promotion to the job of engineer is a 'term or condition' of their em-

ployment which their union may legitimately bargain to protect." 410 F.2d at 1032.

The Court's footnote 21 also deserves quoting:

> "While the railroads were under federal control during World War I, firemen complained that their promotional chances were being impaired by the carriers' practice of hiring outside engineers over the heads of their own firemen with many years' seniority. As a result, the industry adopted the 'Chicago Joint Agreement', which regulated this practice. When the railroads returned to private control, the provisions of the Chicago Joint Agreement were retained through collective bargaining."

The agreement between the A & WP and the BLE, providing, as it does for bringing in outside apprentices to be trained to become engineers, obviously affects the firemen's "historical expectation of promotion" to engineer. At the hearing it was shown that the A & WP had brought in four (4) outside apprentices, App. 179, and it was also shown that a number of appellant's firemen qualified to work as engineers were not so working. App. 348.

Moreover, the A & WP-BLE agreement shows on its face that those two parties negotiated provisions explicitly applicable to firemen. The following provisions are illustrative:

> Article I
>
> 1. (a) "Firemen in the carrier service will be given an opportunity to enroll in the training program in their seniority order by registered mail, return receipt requested. If a fireman does not desire to enter the program, his refusal will be classed as a failure for qualifying purposes, and a seniority number will not be reserved for him on the engineer's roster." App. 395-396.

The A & WP-BLE agreement contains provisions about rates of pay for apprentices, not necessarily the same as those for firemen. Thus, a fireman can be presented a "Hobson's choice", either to forfeit his seniority rights or work at rates of pay negotiated for him not by his own union but by another. Under the Railway Labor Act only the UTU has the right to negotiate for the firemen.

Another example:

Article III

> "Upon successful completion of the training program, an apprentice shall be given a certificate stating that he has become a journeyman locomotive engineer and shall be hired and allowed to work one trip as an extra engineer existing agreement rules to the contrary notwithstanding, thus establishing his engineer seniority as of that date of first service." App. 399.

This "extra engineer" service is what the firemen do. That is, the agreement provides for hiring the apprentices as firemen, under another name. Moreover, the seniority rule set forth is adverse to the interests of the firemen.

Even the National Railway Labor Conference agreed that the BLE proposal adversely affected the firemen. In Circular No. 535-2 of November 17, 1969, DX 18, App. 131, member roads were referred to the BLE's proposal dealing with the "Source of supply and qualification and training of engineers (apprentice engineers)." Member roads were given the opinion that a proposal on such a subject was of "questionable legality," in that, if adopted, it would adversely affect employees holding seniority in a craft represented by another organization . . ." App. 132.

The Court of Appeals for the District of Columbia took note of the fact that the L & N, like the A & WP, had employed apprentices, and said:

> "But that program had been worked out solely between the Carrier and the Engineers. The Firemen had not yet been able to bargain about the nature of the program. The Board could not fairly make its determination on the basis of a program respecting which only one of the two competing unions had had its say. To have done so would have in effect accepted a *fait accompli* achieved only because the carrier had improperly refused to bargain with the Firemen." 410 F.2d at 1034.

It is clear from all of the above that the conclusion of the District Court that the BLE-A & WP program did not affect the "historical expectations" of the firemen to be promoted to engineer (hence, a term or condition of their employment) was clearly erroneous. What the Court did was accept the precise *fait accompli* that the Court of Appeals for the District of Columbia had said could not be accepted since the carrier is even now bringing in apprentices and allowing them to work as firemen (under a different name) and acquire seniority rights vis a vis the firemen.

Since the Carrier improperly altered the status quo, the Court below should have taken the steps necessary to restore it. See **The Detroit & Toledo Shore Line R. Co.**, supra. Since the Carrier had altered the status quo, it was error to enjoin the strike. **The Detroit and Toledo Shore Line**, ibid., where the status quo was ordered restored and the strike was **not** enjoined.

(c) The Real Purpose of the Carrier Is to Destroy the U.T.U., a Purpose Forbidden by the Act

Section 2, Third of the Railway Labor Act provides as follows:

> "Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the

designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives."

Section 2, Fourth provides as follows:

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . ." 45 USC, § 152.

The actions of the A & WP are consistent only with a desire and purpose to destroy the firemen's union. For four years they fought against negotiating with the UTU, and continued to avoid negotiations even after losing the case at 410 F. 2d 1025. Nevertheless, under cover, as it were, of the petitions for certiorari, it rushed out and made, in about a month's time, an agreement with the BLE with numerous provisions affecting the firemen. What could be more calculated to influence the employees to leave the UTU and select the BLE as their representative?

Moreover, the matter cannot be considered in isolation. The history of the dispute, set out in the cited cases, shows that what it is all about is the desire of the railroads to

eliminate the craft of fireman. Award 282 gave the carriers much of what they wanted but they will apparently be satisfied only with the whole loaf. To that end they have employed the tactics described in this brief.

CONCLUSION

Both of the Courts below appear to regard a strike as an alternative to negotiations. The history of this dispute shows that that is not the case. The fact is that there will never be negotiations with respect to Notice No. 3 until the union is free to resort to self-help. As soon as a non-enjoinable strike takes place, the parties will negotiate an agreement, not before. When that happens, some measure of peace may come to the industry.

We respectfully urge that the writ be granted and that the case be remanded with instructions to the Court below to take steps necessary to restore the status quo by ordering termination of the A & WP-BLE training program and any rights that may have accrued or may be claimed under it.

Respectfully submitted

HAAS, HOLLAND, FREEMAN,
LEVISON & GIBERT
Attorneys for the Petitioners

.....
HUGH W. GIBERT

.....
RICHARD N. HUBERT

.....
R. C. FREEMAN, III

2709 First National Bank Tower
Atlanta, Georgia 30303
(404) 525-6141

Certificate of Service

I, Hugh W. Gibert, counsel for Petitioners, hereby certify that I have this date served a copy of this Petition for Writ of Certiorari upon opposing counsel by mailing a copy of the same to attorney of record, properly addressed and with sufficient postage.

This 27th day of April, 1971.

.....

Hugh W. Gibert